Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

(2)

No. 91-144

In The

# Supreme Court of the United States

October Term, 1991

DEBORAH SISKA,

*Petitioner,*

vs.

THE TRAVELERS,

*Respondent.*

## Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN R. PENDERGAST, JR.
Counsel of Record

RIORDAN, CRIVELLO, CARLSON,
MENTKOWSKI & STEEVES, S.C.
710 North Plankinton Avenue
Milwaukee, WI 53203
(414) 271-7722
*Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

I. Whether reviewing court must hold trial *de novo* of factual findings of ERISA plan fiduciary.

## PARTIES INVOLVED

The Travelers, properly The Travelers Insurance Company, is a wholly owned subsidiary of The Travelers Corporation. The Travelers Insurance Company has no subsidiaries which are not wholly owned.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... i

PARTIES INVOLVED ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

ADDITIONAL STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

ARGUMENT ..... 8

The Petitioner Has Failed To Show Special And Important Reasons For Granting Certiorari ..... 8

CONCLUSION ..... 12

# TABLE OF AUTHORITIES

Page

CASES

Arthurs v. Metropolitan Life Ins. Co., 760 F. Supp. 1095 (S.D.N.Y. 1991) ..... 11

Baker v. Big Star Div. of Grand Union Co., 893 F.2d 288 (11th Cir. 1989) ..... 10, 11

Bali v. Blue Cross and Blue Shield Ass'n, 873 F.2d 1043 (7th Cir. 1989) ..... 9

Barish v. United Mine Workers of America Health & Retirement Fund, 753 F. Supp. 165 (W.D. Pa. 1990) ..... 10

Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546 (6th Cir. 1989) ..... 9

Brown v. Blue Cross and Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990) ..... 9

Buchholz v. General Elec. Employee Ben. Plan, 720 F. Supp. 102 (N.D. Ill. 1989) ..... 9

Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir. 1989) ..... 11

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) ..... 8, 9, 10, 11

Guisti v. General Elec. Co., 733 F. Supp. 141 (N.D.N.Y. 1990) ..... 10, 11

Gurnack v. John Hancock Mut. Life Ins. Co., 406 Mass. 748, 550 N.E.2d 391 (1990) ..... 10

Jett v. Blue Cross and Blue Shield of Alabama, Inc., 890 F.2d 1137 (11th Cir. 1989) ..... 9

Moon v. American Home Assurance Co., 888 F.2d 86 (11th Cir. 1989) ..... 10, 11

TABLE OF AUTHORITIES – Continued

Page

Moshin v. John Hancock Mut. Life Ins. Co., No. 88-60412-AA (E.D. Mich. Nov. 27, 1989) ..... 10

Parsons v. West Virginia Works Hourly Employees Pension Plan, 879 F.2d 130 (4th Cir. 1989) ..... 9

Petrilli v. Drechsel, 1989 WL 106639 (N.D. Ill. Sept. 12, 1989) ..... 10

Petrilli v. Drechsel, 910 F.2d 1441 (7th Cir. 1990) .... 10

QuesTech, Inc. v. Hartford Accident & Indemnity Co., 713 F. Supp. 956 (E.D. Va. 1989) ..... 10

Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 1075 (4th Cir. 1989) ..... 11

STATUTES

29 U.S.C. § 1002(21)(A) ..... 2

29 U.S.C. § 1104(a) ..... 2

29 U.S.C. § 1133 ..... 3

RULES

Rule 10.1 of the Rules of The Supreme Court of the United States ..... 8

No. 91-144

In The

# Supreme Court of the United States

October Term, 1991

DEBORAH SISKA,

*Petitioner,*

vs.

THE TRAVELERS,

*Respondent.*

**Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin**

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

## OPINIONS BELOW

The petitioner seeks a writ of certiorari from an opinion of the Wisconsin Court of Appeals decided on February 20, 1991. *Siska v. The Travelers,* 161 Wis. 2d 14, 467 N.W.2d 174 (Ct. App. 1991), *petition for review denied,* which affirmed a Decision and Order of the Walworth County Circuit Court entered on May 3, 1990.

## ADDITIONAL STATUTES INVOLVED

### 29 U.S.C. §§ 1002(21)(A), 1104(a), 1133

**Sec. 1002. Definitions**

For purposes of this title:

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 USCS Sec. 1105(c)(1)(B)].

**Sec. 1104. Fiduciary duties**

**(a) Prudent man standard of care.** (1) Subject to sections 403(c) and (d) [29 USCS Sec. 1103(c) and (d)], 4042 [29 USCS Sec. 1342], and 4044 [29 USCS Sec. 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing

that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of any enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

**Sec. 1133. Claims procedure**

In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

## STATEMENT OF THE CASE

This is a claim for accidental death benefits brought by the wife of Donald J. Siska. In June of 1978, The Travelers issued to the Trustees of Indiana Manufacturer's Association, Inc., Group Trust, a group health and

accidental death and disability policy covering its members. This policy was reissued as Policy Number GA-8058738 effective October 12, 1979. The policy included a $100,000 accidental death benefit. As a member of the Indiana Manufacturer's Association, employees of the Wabash Tape Company, including Donald Siska, were eligible for benefits under the Travelers' policy. Mr. Siska disappeared on August 16, 1981.

On September 28, 1981, The Travelers received a Notice of Claim from Siska's employer, and on December 4, 1981, received a Statement of Disappearance from Siska's wife, Deborah, the petitioner.

Upon receipt of the petitioner's Notice of Claim, The Travelers retained Equifax Services to investigate Siska's disappearance. In addition to reviewing the reports from Equifax, including 26 personal interviews and contacts, The Travelers reviewed the petitioner's Statement of Disappearance as well as the Walworth County Sheriff's Department reports pertaining to the disappearance. Travelers also kept in contact with Metropolitan Life Insurance Company concerning its investigation.

The Travelers' investigation revealed that on August 16, 1981, Donald John Siska and some friends, including his wife, Deborah, left Crystal Lake, Illinois, to go sailing on Lake Geneva. While there is some discrepancy as to the specific facts, once out on the lake, Siska decided to go swimming, perhaps to recover a cap which had blown into the water. The air and water temperature were both in the 60's, it was overcast and windy. One witness stated that Siska had wanted to go swimming all day and had used the cap as an excuse to get into the water. Although

the other passengers were dressed in several layers of clothing, Siska stripped down to a pair of swimming shorts, which he already had on, and entered the water. According to witnesses, Siska swam to the cap and gave a salute to the other passengers. By this time, the sailboat had drifted some distance from Siska and one passenger, Wayne Van Horn, started the sailboat motor so that Siska could be recovered. Siska has not been seen since. The Walworth County Sheriff's Department conducted an immediate air and water search, including the use of sonar, diving, and five days of dragging at different depths. An underwater search was also conducted by a friend of one of Siska's daughters with no results.

Five months prior to his disappearance, Siska had been granted a divorce from his then wife, Glee Lynn Siska. Pursuant to the divorce decree, Siska was ordered to maintain existing life insurance coverage for the benefit of his children. In addition, Siska was ordered to pay $340.02 every two weeks to his ex-wife as child support. He was also ordered to pay $15,000 toward his wife's attorney's fees. At that time, Siska listed his income as $808.64 every two weeks. On March 4, 1981, judgment for dissolution of Siska's marriage was granted.

At the time of his disappearance, Siska owed over $10,000 to various creditors. Siska also owed three months back child support to his ex-wife. Siska's ex-wife, now Glee Lindquist, reported that her ex-husband had advised her just prior to his disappearance that he was in dire financial straits. At that time, he requested that Mrs. Lindquist reopen her 1980 tax returns so that he might receive a refund by filing a joint return. Mrs. Lindquist also stated that she had been contacted in March of 1981,

five months prior to her husband's disappearance, by IRS agents concerning her ex-husband's tax arrearage. Mrs. Lindquist further indicated that her husband hated swimming and even when their children would want to go swimming, Siska would follow them in a canoe instead of getting into the water.

By letter dated May 4, 1983, Travelers advised Deborah Siska through her attorney, Robert Arnold, that based on their investigation, it could not be concluded that Donald John Siska suffered an accidental death on August 16, 1981. Contrary to the assertion of the petitioner, the petitioner's claims were not denied because Donald Siska had "staged his disappearance", although that possibility was taken into consideration.

Subsequent to the filing of this action, The Travelers sought removal to the United States District Court for the Eastern District of Wisconsin based on a letter received from the plaintiff citing the Employers Retirement Income Security Act and requesting attorney's fees. Pursuant to 28 U.S.C. § 1446(b), The Travelers sought removal based on the fact that this was the first indication by the plaintiff that they were seeking relief under federal law. The Federal District Court for the Eastern District of Wisconsin remanded the matter to Walworth County Circuit Court holding that, although the plaintiff's claim was preempted by ERISA, the defendant's removal was not timely.

On June 3, 1988, the defendant moved for summary judgment arguing that the plaintiff's claim for accidental death benefits under The Travelers' policy was preempted by ERISA and that under ERISA the court was to

overturn the decision of The Travelers denying benefits only if arbitrary and capricious. At a pretrial conference held on July 5, 1988, it was agreed that the court would bifurcate the federal preemption and standard of review questions. Briefing proceeded on the preemption issue, and on October 28, 1988, Judge Race issued a Memorandum Decision finding that state law was preempted and also holding that The Travelers' decision was not arbitrary and capricious.

The plaintiff filed a motion to vacate the court's decision with respect to the standard of review and the parties agreed that this issue should be briefed. On September 11, 1989, Judge Race held that the plaintiff was entitled to a trial *de novo* on the issue of whether there had been an accidental death.

On January 30, 1990, The Travelers moved for summary judgment based on an Illinois divorce decree assigning all life insurance proceeds to Donald Siska's children. On February 5, 1990, The Travelers brought a motion for reconsideration and alternative motions *in limine* arguing that recent federal court decisions compelled the court to apply the arbitrary and capricious standard of review and, in the alternative, that the court's review under either standard be limited to the record before The Travelers at the time the decision to deny benefits was made.

On March 19, 1990, Judge James L. Carlson heard argument on these issues and ruled that there was an issue of fact as to the intent of the parties to the divorce decree precluding summary judgment on that issue.

Judge Carlson further held that an arbitrary and capricious standard of review should be applied under the facts presented. Based on this ruling, Judge Carlson upheld the decision of The Travelers denying benefits to the plaintiff. The plaintiff then requested leave to submit additional materials to The Travelers for consideration. This request was granted and the matter was remanded to The Travelers for review. The Wisconsin Court of Appeals affirmed. The plaintiff filed a Petition for Review which was denied by the Wisconsin Supreme Court by order dated April 30, 1991.

## ARGUMENT

**The Petitioner Has Failed To Show Special And Important Reasons For Granting Certiorari.**

Without citing the provisions of Rule 10 of the Supreme Court Rules, the petitioner appears to argue that there is conflicting authority on the issue presented by this case. The majority of the cases cited by the petitioner, however, are trial court decisions. Under Rule 10.1, the Court will consider a petition for a writ of certiorari where there is a conflict between United States court of appeals or when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals. The petitioner has failed to show such a conflict.

The Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) held that:

> A denial of benefits challenged under sec. 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

*Firestone*, 489 U.S. at 115. The Court, however, limited the breadth of this holding.

> The discussion which follows is limited to the appropriate standard of review in sec. 1132(a)(1)(B) actions challenging denials of benefits *based on plan interpretations*.

489 U.S. at 108. (Emphasis added.)

The petitioner is correct in asserting that many courts since *Firestone* have considered the standard of review question. The petitioner has not shown, however, that there is a conflict in the resulting case law or that this Court's guidance is necessary.

Since *Firestone*, the first line of defense for an administrator in denial cases has been to assert an express grant of discretionary authority under the terms of the benefit plan. Naturally, in some of these cases discretionary authority has been found and in others it has not. *See, e.g., Parsons v. West Virginia Works Hourly Employees Pension Plan*, 879 F.2d 130 (4th Cir. 1989); *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990); *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137 (11th Cir. 1989); *Bali v. Blue Cross and Blue Shield Ass'n*, 873 F.2d 1043 (7th Cir. 1989); *Buchholz v. General Elec. Employee Ben. Plan*, 720 F. Supp. 102 (N.D. Ill. 1989); and *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989).

In cases in which review of factual findings is sought, plan administrators have also argued that they have "inherent discretion" to decide factual issues. The courts addressing this issue have held that no such "inherent discretion" exists. *See, e.g., Baker v. Big Star Div. of Grand Union Co.*, 893 F.2d 288 (11th Cir. 1989); and *Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989).

In this case, The Travelers argued that *Firestone*, by its express language, was limited to cases involving plan interpretation. The Wisconsin Court of Appeals agreed. This holding is consistent with the holdings of various federal trial courts that have addressed this specific issue. *See QuesTech, Inc. v. Hartford Accident & Indemnity Co.*, 713 F. Supp. 956 (E.D. Va. 1989); *Petrilli v. Drechsel*, 1989 WL 106639 (N.D. Ill. Sept. 12, 1989), *rev'd on other grounds; Moshin v. John Hancock Mut. Life Ins. Co.*, No. 88-60415-AA (E.D. Mich. Nov. 27, 1989) (order granting summary judgment); and *Barish v. United Mine Workers of America Health & Retirement Fund*, 753 F. Supp. 165 (W.D. Pa. 1990).

The petitioner attempts to create a conflict by citing nine cases; three of which are trial court decisions. Of those nine cases, only three arguably address the issue presented by this case. In two of those three, the issue was discussed only in dicta. *See Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990) (" . . . we are not faced here with a factual question, but, as in *Bruch*, an interpretive one."); and *Gurnack v. John Hancock Mut. Life Ins. Co.*, 406 Mass. 748, 550 N.E.2d 391 (1990) ("Each party has accepted the arbitrary and capricious standard as applicable."). The remaining case, *Guisti v. General Elec. Co.*, 733 F. Supp. 141 (N.D.N.Y. 1990), is not in conflict with the decision of the Wisconsin Court of Appeals herein.

> It is far from clear in the present case that the defendants' decision to deny benefits was based solely on factual findings.

*Guisti*, 733 F. Supp. at 147.

The remaining cases cited by the plaintiff simply are not on point. The standard of review question was neither raised nor argued in *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692 (7th Cir. 1991), or *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989).

The issue in *Dzinglski* was whether an ERISA fiduciary is obligated to disclose to a discharged employee, who applies for early retirement benefits, the reasons for his discharge if the denial of benefits is otherwise in accordance with the plan. 875 F.2d at 1076. As previously discussed, in *Moon* and *Baker* the defendants argued that they had "implied" discretion to make factual determinations under the terms of the respective plans involved. In *Arthurs v. Metropolitan Life Ins. Co.*, 760 F. Supp. 1095 (S.D.N.Y. 1991), Metropolitan Life argued that it was granted discretion under the terms of its policy to rule on eligibility for benefits. In its decision, the trial court in *Arthurs* disagreed.

The petitioner has failed to show a conflict in the case law post-*Firestone*. The cases cited by the petitioner which squarely address the issue raised in this case, support the decision of the Wisconsin Court of Appeals. If indeed a legitimate conflict arises with respect to this issue, the Court's guidance may be required. It is not a question, however, which requires the Court's intervention at this time.

## CONCLUSION

Petitioner has failed to show special and important reasons for granting certiorari. For the reasons stated in this response and upon the rationale of the lower court decisions, the respondent respectfully requests that the Petition for Writ for Certiorari be denied.

Respectfully submitted,

JOHN R. PENDERGAST, JR.
Counsel of Record

RIORDAN, CRIVELLO, CARLSON,
MENTKOWSKI & STEEVES, S.C.
710 North Plankinton Avenue
Milwaukee, WI 53203
(414) 271-7722
*Attorneys for Respondent*